

1 evidence. But it seems to me that there's justification for
2 deposing her on that issue. And I'll allow the parties to
3 do so.

4 Section 1.311(b) provides that persons and parties
5 -- this is with respect to issues 2, 3 and 4 -- Section
6 1.311(b) provides that persons and parties may be examined
7 regarding any matter not privileged which is relevant to the
8 hearing issues. Press and the trial staff urge to grounds
9 for overruling RBC's privilege of claim with respect to
10 issues 2, 3 and 4.

11 First they contend that RBC will have waived its
12 privilege if RBC is going to assert that it relied on the
13 advice of counsel in its understanding that its filings met
14 the FCC's candor requirements citing Hanguards, Inc. versus
15 Johnson, 413 fed. supplement 926 at 932 to 33, Northern
16 District of California and other cases. And the presiding
17 judge agrees that the privilege claim would be waived with
18 respect to any issue where RBC asserted that defense.
19 However, RBC, has not indicated intention to do so. And
20 that's my first question, is does RBC intend to assert a
21 defense with respect to issues 2, 3 or 4 that RBC relied on
22 the advice of counsel in its understanding that its filing
23 met the FCC's candor requirements, Mr. Eisen?

24 MR. EISEN: It's the first time I've addressed
25 that question, Your Honor.

1 JUDGE CHACHKIN: Well, that's my concern.

2 Obviously --

3 MR. EISEN: I think it's proper discovery to Mr.
4 Rey. Off the top of my head, I would say no, but I think
5 it's something that they can discovery through his
6 deposition testimony.

7 JUDGE CHACHKIN: Well, what I'm saying, if Mr. Rey
8 takes the position that he relied on the advice of counsel
9 in its filings -- its pleadings with the Commission, then
10 the parties would have a right, it seems to me, to explore
11 with counsel exactly what was discussed and what advice it
12 provided. If it doesn't take that position, then that
13 question doesn't present itself. And we're not going to
14 have a situation where Mr. Rey is going to take the stand
15 and say my defense is that I relied on advice of -- I told
16 counsel -- told them all the facts and counsel prepared this
17 motion, whatever it was, and don't blame me; you know, the
18 illness is on counsel or this would mitigate what ever
19 happened because I relied on counsel.

20 MR. EISEN: I don't think that that's possible. I
21 don't think that that will arise at all. But I haven't
22 spoken to Mr. Rey about that matter. And I think it's
23 something that's reasonably raised at this point. But
24 nevertheless -- and I can't imagine taking that defense.
25 It's something that I don't have an answer to.

1 JUDGE CHACHKIN: Well, but the parties have a
2 right -- because if -- if that defense is going to be taken
3 with respect to any of the issues, particularly the
4 misrepresentation issues, then the parties would have a
5 right it seems to me to depose Ms. Polivy and Mr. Renouf as
6 to what exactly took place with respect to the preparation
7 of the documents.

8 MR. EISEN: No, I don't think that is -- off the
9 top of my head --

10 JUDGE CHACHKIN: I'll permit you an opportunity.
11 But I want to make clear --

12 MR. EISEN: Understood.

13 JUDGE CHACHKIN: -- that I want you to be able to
14 provide that information to me and the parties by a certain
15 date so they can know whether they have to go forward --
16 whether they can go forward and -- yes, Ms. Polivy?

17 MS. POLIVY: Your Honor, I'm not sure I understand
18 the question. I mean, any client relies on a lawyer to
19 say -- you know, the client says these are the facts; the
20 lawyer writes up whatever is written up. I mean, if you're
21 asking -- a client never says I know the law. A lawyer
22 would say this set of facts -- you know, I don't see any
23 problem with it. And certainly, that isn't what you're
24 asking.

25 MR. EISEN: No, I don't think that's the point

1 that you've raised.

2 JUDGE CHACHKIN: No, that's not the point.

3 MS. POLIVY: Okay. Could you --

4 JUDGE CHACHKIN: Well, I'm saying if a
5 misrepresentation ensues and if the client says the position
6 I'm taking is that I'm -- at least as far as mitigation is
7 concerned, that I had confidence in my attorney and my
8 attorney told me this would be all right to say in the
9 pleading -- in the motion, and I relied on it. And if
10 anything went wrong, then I'm innocent.

11 MR. EISEN: I think that's highly unlikely.

12 JUDGE CHACHKIN: Well, I don't know. It's
13 happened in other cases.

14 MR. EISEN: I understand that, too.

15 JUDGE CHACHKIN: And if that's the assertion, the
16 parties certainly would have a right it seems to me to
17 depose counsel as to exactly what if anything was discussed.
18 And I'll afford you an opportunity to consult with your
19 client and provide the parties with whether or not you
20 intend to assert that kind of defense.

21 MR. EISEN: Very good. Your Honor.

22 JUDGE CHACHKIN: Now, how much time will you need
23 to -- I don't know when these depositions are supposed to
24 take place?

25 MR. COLE: Ms. Renouf is scheduled for next

1 Monday.

2 JUDGE CHACHKIN: All right.

3 MS. POLIVY: Your Honor, that would not -- that
4 schedule isn't possible anyway because we're supposed to be
5 in Chicago on Monday preparing the witness for Tuesday.

6 JUDGE CHACHKIN: Well, certainly prior to the --
7 the deposition, the parties should be advised as to whether
8 you intend to maintain your right to make that defense or
9 not.

10 MR. EISEN: Well, the deposition -- we can have an
11 answer to you on Monday.

12 JUDGE CHACHKIN: All right. And to the parties.

13 MR. EISEN: To the parties.

14 JUDGE CHACHKIN: As I say, if the parties don't
15 intend to assert that defense, then the concern -- that
16 basis for waiving the privilege doesn't exist and I will not
17 permit it. The second basis given is press and the trial
18 staff also assert that the crime/fraud exception to the
19 attorney-client privilege is a basis for permitting a waiver
20 of the attorney-client privilege. They cite the fact that
21 the Commission has recognized the waiving of the privilege
22 applicable to financial misrepresentation issues similar to
23 issue 2 citing Edwin A. Bernstein, 7 Fed. 2nd, record 1492
24 which was a review board decision in 1992.

25 However, Bernstein instructs that the mere

1 allegations of wrong-doing will not destroy the privilege.
2 Bernstein provides that two conditions must be met to
3 validate the privilege. First, there must be prima facie
4 evidence that the charge has some foundation in fact.
5 Second, there must be some reasonable relationship between
6 the advice and the subject matter of the possible violation.

7 Press and the trial staff's showing which consists
8 solely of speculation as to what RBC and its attorneys may
9 or may not have done falls far short of what is necessary to
10 invoke the crime/fraud exception to the attorney-client
11 privilege. So as I've indicated, the waiver would only be -
12 - I would say the waiver here of the attorney-client
13 privilege would only exist depending on what Mr. Eisen
14 indicates as to whether or not he intends to argue that the
15 client acted -- relied on the attorney.

16 Now, the final matter is sequestration. Now, do
17 the parties want any further discussion on that before I
18 rule on that matter?

19 MR. BLOCK: That's our motion. And I don't know
20 if there's anything more that we need to say at this point.
21 The -- the focus of the motion is now somewhat changed in
22 light of your first ruling. But it's now clear based on
23 where you've come out on the -- on the motion for a
24 protective order that both Ms. Polivy and Ms. Renouf will be
25 witnesses and ought to be witnesses in this matter. And at

1 that point, the -- the reason for sequestration ought to
2 apply to them as well as to any other witness.

3 We have not sought disqualification of Ms. Renouf
4 and Ms. Polivy. She's sitting here without our objection
5 today. And as to the citation of Judge Ritchie's opinion at
6 the end of the opposition to our motion to sequester, I
7 think actually it supports us rather than hurts us -- our
8 position. Judge Ritchie said that he would not disqualify
9 an attorney from pre-trial proceedings where there was no
10 questioning on of witnesses involved. There was not a case
11 where discovery was about to proceed, but the trial was
12 about to proceed.

13 And he says you can stay here for the pre-trial
14 matters; but when the time comes for the examination of
15 witnesses, that's when this rule -- which says that if
16 you're going to be a witness, you ought not be in the
17 courtroom because of sequestration -- would apply. Well,
18 that same procedure would apply here in the same way. Ms.
19 Renouf and Ms. Polivy can represent the interest of their
20 client in discovery matters, in production of documents, in
21 arguments before the -- before Your Honor.

22 But when it comes to sitting down and cross
23 examining witnesses on the subject matter of which they are
24 to be witnesses, it doesn't make any sense to permit that to
25 happen. And as a matter of fact, we believe it's a -- it

1 would taint the record from what otherwise would be a proper
2 approach to examination of the witnesses.

3 JUDGE CHACHKIN: But aren't you in effect -- even
4 though you aren't labeling it that, aren't you in effect
5 seeking to disqualify counsel from participating by what
6 you're doing? I mean, if you feel that counsel should be
7 precluded by the D.C. code from participating in the hearing
8 because she's a necessary witness, then why haven't you
9 filed a motion to disqualify counsel from participating? I
10 mean, it suits me what you're -- in essence, this is what
11 you're seeking to accomplish.

12 MR. BLOCK: I think that what Judge Ritchie has
13 decided is the approach that we're taking.

14 JUDGE CHACHKIN: Was that an attorney involved?

15 MR. BLOCK: Yes, it was. That was the whole
16 point, that there was disqualification. But he wasn't
17 disqualified at the -- from representing his client at pre-
18 trial matters that did not involve questioning of witnesses.

19 MS. POLIVY: Your Honor, Judge Ritchie was not
20 addressing depositions at all.

21 JUDGE CHACHKIN: Well, that's what I --

22 MS. POLIVY: Judge Ritchie was addressing the
23 counsel at trial. Is that true, Mr. Block?

24 MR. BLOCK: Yes. The point was that this came
25 up -- the issue was not should we have depositions or not.

1 This is a -- immediately before the trial. And he allowed
2 him to stay at the pre-trial matter that didn't involve
3 questioning of witnesses. I'm saying that the case is not
4 heard of because it doesn't involve a situation where he
5 says oh, you can have discovery. That's not the case.
6 Ritchie doesn't say that. He says very simply we're not
7 going to disqualify you from representing the interests of
8 your client except where you cannot be representing your
9 client when you must take the stand as a witness --

10 JUDGE CHACHKIN: Well --

11 MR. BLOCK: -- during the times of questioning the
12 witnesses.

13 JUDGE CHACHKIN: Well, I -- but we're dealing here
14 with discovery, with depositions. I don't know what -- that
15 case didn't involve depositions

16 MR. BLOCK: It didn't involve depositions.

17 JUDGE CHACHKIN: Well, then I don't see how it's
18 relevant to the situation here.

19 MR. BLOCK: The -- we don't -- with Ms. Polivy,
20 they already made a decision early on this case to take
21 themselves out of representation of RBC. For some reason,
22 she hasn't disclosed or shared with anyone else here what
23 her rationale was. One would assume the rationale was that
24 she couldn't represent RBC because she was -- she should be
25 a witness and will be witness -

1 MS. POLIVY: Your Honor --

2 MR. BLOCK: -- on those matters.

3 MS. POLIVY: This is rank speculation.

4 MR. BLOCK: But --

5 JUDGE CHACHKIN: I know. I agree with you, Ms.

6 Polivy.

7 MR. BLOCK: But the point is is that RBL then
8 chose to intervene in this case, sought all the attorneys in
9 the country to represent it as -- in this intervention; and
10 chose the one lawyer that already withdrew from this matter
11 and the one lawyer which should be disqualified. If there
12 is going to be disqualification -- and I don't think we have
13 to go that far -- but if there is going to be
14 disqualification, it really is -- they are -- RBL is so
15 tangential to the issues in this case, particularly after
16 your decision about Mr. Loftus and the decision about what
17 discovery is going to be about.

18 RBL wasn't around on the Conant times. RBL's
19 interest in this case is at most a contingent interest. And
20 if -- if there's going to be disqualification, it can
21 possibly be just limited given that situation to where the
22 lawyer they chose is also a witness and not at this -- at
23 the pre-trial matters where they are -- where there's no
24 taint and no problem.

25 JUDGE CHACHKIN: Well, it seems to me either

1 they're disqualified or they're not disqualified. If you
2 feel that Ms. Polivy should be disqualified because of the
3 fact she didn't testify, you feel she's a necessary witness,
4 then you should file a motion to disqualify her. I don't
5 understand this Mickey Mouse business of trying to keep her
6 from cross examining witnesses. If you feel that she should
7 not participate, then file a motion and we'll have a ruling
8 on it. But I don't think the case you cited is precedent
9 for your position.

10 I assume from what you're telling me, the lawyer
11 in the Ritchie case was not committed to participate in the
12 hearing itself.

13 MR. BLOCK: That's correct.

14 JUDGE CHACHKIN: Well, if that's your position,
15 that she should not be permitted to participate in the
16 hearing or the deposition --

17 MR. BLOCK: That is our position.

18 JUDGE CHACHKIN: -- or both --

19 MR. BLOCK: That is our position.

20 JUDGE CHACHKIN: -- well, then you should file a
21 motion to disqualify her and cite the rule and we'll have a
22 ruling and I'll have what she has to say and I'll make a
23 ruling on it. But I don't think it should be a basis for
24 sequestration.

25 MR. BLOCK: I guess I'm confused as to where --

1 JUDGE CHACHKIN: In other words, if your concern
2 is about sequestration solely, then there's an easy
3 solution, namely the one which I gave you at the last
4 session, namely put Ms. Polivy and Ms. Renouf on first if
5 that's all you're interested in. But it's obvious from your
6 pleading your not talking about sequestration. You're
7 talking about her right to cross examine witnesses.

8 MR. BLOCK: I'm talking about both, Your Honor.

9 JUDGE CHACHKIN: Well, but this is what you're
10 really opposed to, her cross examination of witnesses.

11 MR. BLOCK: Right.

12 JUDGE CHACHKIN: And it seems to me if you feel
13 that way, then you should move to disqualify her as counsel,
14 not play games by saying we should impose a sequestration
15 order and, therefore, she'll be precluded from participating
16 as counsel.

17 MR. BLOCK: Okay.

18 JUDGE CHACHKIN: I mean, that's what it seems to
19 me you should be doing if that's the way you feel is the
20 case, because I gave -- I said before, I don't think the
21 reason you've given to preclude her from cross examining
22 witnesses provides a bases for the relief you seek because
23 this fear that somehow she's going to contaminate the
24 proceedings by asking questions is kind of silly in view of
25 the fact that as a matter of public record, all the

1 witnesses have already given public statements.

2 And the view that somehow there's going to be all
3 kinds of other attorneys there, she's going to be able to
4 color their testimony and they're going to testify to give
5 less than truthful testimony as to what occurred because of
6 the questions she's posing is pretty ludicrous in my mind.
7 And I don't see that as a basis for preventing her from
8 cross examining witnesses.

9 And as I indicated before -- you might not like it
10 -- you may prefer to have your order of witnesses and have
11 Ms. Polivy and Ms. Renouf testify last. But you have your
12 choice. And I will permit you if necessary after you've
13 completed all your examination of all the witnesses to
14 recall Ms. Polivy and Ms. Renouf if it's necessary after all
15 the other witnesses have testified if you can demonstrate
16 there's a basis for it. But as I say, the simple solution
17 is -- is to have her testify first. So I'm going to deny
18 your motion for sequestration.

19 I don't know, Ms. Polivy, if you have anything you
20 want to add.

21 MS. POLIVY: No, I just have -- I would like to
22 observe that Mr. Block's equation of a deponent with a
23 witness in the trial sense is misplaced. The federal rules
24 make it very clear there's a difference between deposition,
25 discovery and witnesses at trial. And they're covered by

1 totally different rules on sequestration. Sequestration at
2 trial is covered by 615 which is available upon request.
3 Sequestration in depositions is covered by Rule 26 which
4 requires a much higher standard. We briefed the cases and -
5 -

6 JUDGE CHACHKIN: Well, I permit sequestration
7 generally with the exception of letting you -- taking you
8 first so that you can --

9 MS. POLIVY: Your Honor, that -- the problem that
10 that raises is that Mr. Rey would be Rainbow's
11 representative and --

12 MR. BLOCK: Your Honor, we don't object to -- we
13 don't --

14 MS. POLIVY: -- and he's entitled --

15 MR. BLOCK: We don't object to Mr. Rey being --

16 MS. POLIVY: Oh, okay.

17 MR. BLOCK: That's not the issue here. We never
18 asked for that.

19 JUDGE CHACHKIN: Then there's no problem
20 apparently. But we do have the question remaining of what's
21 going to happen at trial stage which we're getting awfully
22 close to. What is your position, Ms. Polivy? Do you intend
23 to participate in the trial if you're called as a witness --

24 MS. POLIVY: Your Honor --

25 JUDGE CHACHKIN: -- apparently the indication is

1 you are going to be called as a witness.

2 MS. POLIVY: Well, I don't -- the question is
3 whether I'm a necessary witness. And we would like it --
4 first of all, I don't think that that's a determination that
5 we could make or the court could make prior to the
6 conclusion of discovery. If, for example -- and the cases
7 are quite clear that if the information that the attorney
8 can give is available from other sources, then the attorney
9 is not a necessary witness. And I don't think we can know
10 that until the depositions are complete.

11 There may be no conflict as far as fact is
12 concerned. In fact, as far as we know at this point, the
13 likelihood of a difference in material fact is not apparent.
14 If the question is a legal question as opposed to a factual
15 question, then that is not a question on which anyone need
16 be a witness.

17 JUDGE CHACHKIN: Well, you cited the D.C. code I
18 believe in your pleading. And as you pointed out --

19 MS. POLIVY: The D.C. Rules of Professional
20 Conduct.

21 JUDGE CHACHKIN: Yes, the D.C. Rules of
22 Professional Conduct, and --

23 MS. POLIVY: Yes, Rule 37. Would you like a copy
24 of it?

25 JUDGE CHACHKIN: And as you pointed out, that's --

1 I don't have the rules with me today.

2 MS. POLIVY: I do if you'd like them.

3 JUDGE CHACHKIN: But you pointed out that there
4 are certain exceptions, and I haven't familiarized myself
5 with certain exceptions --

6 MS. POLIVY: That's correct.

7 JUDGE CHACHKIN: -- but I can't perceive how you
8 would not be an essential witness considering that you had
9 discussions with the staff and you also took part in this
10 meeting and -- and --

11 MS. POLIVY: Well --

12 JUDGE CHACHKIN: -- and discussions with the
13 staff, it was you personally who had the discussions with
14 certain staff members.

15 MS. POLIVY: Well, Your Honor, for example, if
16 there is no -- if there is no difference between what the
17 staff says the discussions were about and what I would
18 testify they were about, obviously I'm not a witness or a
19 necessary witness for that. I -- all that I've said -- and
20 I am not urging you at this point --

21 JUDGE CHACHKIN: Then it seems to --

22 MS. POLIVY: -- to make a determination.

23 JUDGE CHACHKIN: Yes.

24 MS. POLIVY: What we have said is that is not a
25 determination that we can make until we know that.

1 JUDGE CHACHKIN: And also --

2 MS. POLIVY: And we would -- you know, we would
3 like the opportunity.

4 JUDGE CHACHKIN: But -- and also it seems clear
5 that essentially you're an essential witness in presenting
6 evidence as to whether the ex parte violation was
7 intentional or not. I mean, you -- you're the one who dealt
8 with this and you have to testify what your motive was and
9 what you had in mind and all the rest. I don't know where
10 else the it should come from

11 MS. POLIVY: Well, Your Honor, I don't think at
12 this point --

13 JUDGE CHACHKIN: And there is an issue as intent.

14 MS. POLIVY: -- would be the appropriate time to
15 argue that case because the question is -- I mean, our
16 position -- if, for example, it is simply a legal question,
17 that's not something on which you take evidence.

18 JUDGE CHACHKIN: The issue deals with intent. The
19 Commission and the courts have determined that there was an
20 ex parte violation. The question is was it intentional or
21 not.

22 MS. POLIVY: Well, Your Honor --

23 JUDGE CHACHKIN: I understand your legal position,
24 but that's not before us. But what's -- the question is
25 whether it was intentional. And I can't, based on what I've

1 seen and heard so far, can't imagine that anyone could --
2 would be more knowledgeable of whether there was intent or
3 not than you. And I don't -- in the absence of your
4 testifying, I don't know where -- where -- how you can
5 demonstrate that it wasn't intentional, frankly.

6 MS. POLIVY: Your Honor, I -- you know, I'm not
7 prepared at this point to --

8 JUDGE CHACHKIN: Well, that's based on all I've
9 heard and seen.

10 MS. POLIVY: I understand --

11 JUDGE CHACHKIN: And so what I'm saying --

12 MS. POLIVY: I understand your position.

13 JUDGE CHACHKIN: Well, all I can say is that it's
14 not my intention to delay the hearing if it becomes
15 necessary for -- for you to recuse yourself because -- of
16 the fact that you're a necessary witness because Mr. Eisen
17 is here. And I believe the case can go forward. And I
18 would not delay the hearing to permit RBL to obtain new
19 counsel.

20 MS. POLIVY: I understand.

21 JUDGE CHACHKIN: All right. So I intend to go
22 forward. And I -- chances are, as Ms. Polivy points out, we
23 won't know -- won't know whether she's a necessary witness
24 until after the depositions are over. So we won't -- I
25 won't be able to make a ruling until the eve of the hearing,

1 maybe the very day the hearing starts. But the parties are
2 put on notice that a substantial question exists in my mind
3 on how it can be avoided that Ms. Polivy is a necessary
4 witness. And, therefore, it's my intention to go forward to
5 hearing since RBC -- which all the issues concern RBC and
6 its counsel -- is available for us to go forward to hearing
7 regardless of what determination is made with respect to Ms.
8 Polivy representing RBL.

9 There's -- there's one other matter I think I
10 should bring up now, and that's the joint notice of
11 deposition of Mr. Andary, A-N-D-A-R-Y, which -- which was
12 filed on the 13th of May. And I don't know if the parties
13 want to venture any views or whether they want to -- first
14 of all, do the parties intend to oppose this motion?

15 MR. BLOCK: We haven't -- I haven't come to a
16 conclusion about that yet.

17 JUDGE CHACHKIN: You know, Mr. Andary is of course
18 the director of investigations of the FCC Office of
19 Inspector General and --

20 MS. POLIVY: He was at the time, Your Honor. He
21 is no longer at the FCC.

22 JUDGE CHACHKIN: I see. And -- well, that's an
23 interesting question. If someone was at the FCC and
24 performing their duties, does this require Commission
25 consent before he can testify as to Commission matters?k

1 MR. BLOCK: It's a matter which I would have to
2 research. I remember seeing some issues on that, but I
3 don't remember how they came out.

4 MS. POLIVY: Your Honor, I have been told not, but
5 the only case that the Commission has had dealt with a
6 Commission employee whose deposition was sought out while he
7 was an employee for matters that took place prior to his
8 employment. And the Commission said that that is not what
9 the rule was intended to go through, that he could be
10 deposed without their permission.

11 The rule reads, "deposing employees of the
12 Commission." It does not say anyone who used to be a -- an
13 employee of the Commission.

14 JUDGE CHACHKIN: Well, if --

15 MS. POLIVY: I -- so the answer is I don't think -
16 -

17 JUDGE CHACHKIN: Well. I don't think --

18 MS. POLIVY: -- that there's been a case on it.

19 JUDGE CHACHKIN: Well I don't think -- I think
20 there is some -- something available on it. If you recall,
21 what was it, Fox Telecasting -- Fox Telecasting where you
22 had a situation where they wanted to obtain statements from
23 former Commission employees and former commissioners
24 themselves. And the Commission had to rule on whether or
25 not they could provide that information or testify or give

1 evidence because what was involved is when they were
2 commissioners.

3 MS. POLIVY: Do you have any idea --

4 JUDGE CHACKIN: And I think they had -- pardon
5 me?

6 MS. POLIVY: Do you have any idea of the year --
7 you know, approximately when it would have taken place?

8 JUDGE CHACKIN: Well this happened last year.

9 MS. POLIVY: Oh, Fox -- ch, this -- okay.

10 JUDGE CHACKIN: Yes. And I'm sure that my
11 recollection is that the Commission -- before they had
12 permission to provide any evidence, they had to get the
13 permission of the Commission because what they were
14 testifying to are matters involving things which where when
15 they were commissioners. So I think -- I would think off-
16 hand that the Commission would have to approve Mr. Andary
17 testifying --

18 MS. POLIVY: Wouldn't he --

19 JUDGE CHACKIN: -- about something when he
20 investigated a matter involving the Commission.

21 MS. POLIVY: Would you like us to submit a short -
22 -

23 JUDGE CHACKIN: Well, I don't think it's
24 necessary because I don't -- I intend to deny the -- in the
25 first place, as I say, I would not on my own grant this

1 without the Commission first reviewing it because it seems
2 to me based on Fox and clearly what was involved here was
3 not -- is not what Mr. Andary did when he was in private
4 practice, but what he did before the Commission. And,
5 therefore, the Commission would have to make a determination
6 whether this was something that would require Commission
7 consent.

8 And I'm not prepared to make that determination.
9 And based on my -- what I recall about Fox, the Commission
10 did in fact grant the waiver so that they could provide
11 evidence as to what took place in the Fox deliberations.

12 MS. POLIVY: Then as I understand the procedure
13 and the scripts you would first have to make a determination
14 of relevance before we could ever go to the Commission to
15 ask.

16 JUDGE CHACHKIN: That's right. And I'd have to
17 first wait for the opposition and your response. And that
18 will take us long past the June 4th date for ending
19 discovery -- June 7th date for ending discovery. So it
20 would seem to me if you wanted to take his deposition, it
21 should have been filed a long time ago, not at this late
22 stage. That's my first reason.

23 Secondly, I don't see how his testimony is
24 relevant since he has no personal knowledge of what took
25 place. All he did was conduct an investigation and take

1 testimony from various individuals. And the question before
2 him was whether the ex parte rules were violated, not
3 whether there was an intentional violation.

4 So first of all, he doesn't have any personal
5 knowledge. And what he does have knowledge of is not
6 relevant to the issues in this case. So for those reasons
7 and as I indicated also, because this -- any determination
8 from the Commission would go way beyond the June 4th -- June
9 7th date for the closure of discovery, I will not -- I will
10 on my own motion not permit the deposition of Mr. Andary.

11 Is there anything else the parties want to take
12 up? I hope this is the last time we meet before the hearing
13 date. My situation is this. I intend to go on vacation on
14 June 4th, and I will not return until June 21st which will
15 be the hearing date. So if there's anything that the
16 parties can think of now which would in any way affect the
17 discovery or anything else, I'd like to hear about it now.

18 MR. EISEN: I'm sorry. Your Honor. You're leaving
19 June 4th?

20 JUDGE CHACHKIN: Fourth.

21 MR. EISEN: And returning on the 24th?

22 JUDGE CHACHKIN: Twenty-first.

23 MR. EISEN: Oh, 21st.

24 JUDGE CHACHKIN: Seventeen days, yes.

25 MS. POLIVY: Your Honor, could we just have a

1 minute?

2 JUDGE CHACHKIN: Sure. We'll go off the record.

3 (A discussion was held off the record.)

4 JUDGE CHACHKIN: We're back on the record. In
5 view of my rulings, do you intend to depose Ms. Polivy and
6 Ms. Renouf earlier or what? I mean, you have the right to
7 do what you want.

8 MR. BLOCK: I'll have to confer with Mr. -- with
9 the lawyers about that. I -- at this point, I don't plan to
10 change the schedule. And the Commission's order that came
11 down last week on the -- on the scope of the deposition of
12 the -- of the FCC employees has some impact on that, as
13 well. So I'll have to consider that. But I have no
14 particular plan at this point to change the order.

15 MS. POLIVY: Your Honor, I have noted that the
16 20th is not a possible date for Ms. Renouf.

17 MR. BLOCK: Yes, we heard that and we'll have to -
18 -

19 MR. COLE: With a caveat that there will be some
20 rescheduling of Ms. Renouf because of that.

21 JUDGE CHACHKIN: Right. Well, the parties can get
22 together and reschedule that.

23 MS. POLIVY: That's fine.

24 JUDGE CHACHKIN: And I'll be available until June
25 4th to make any rulings if necessary. Otherwise, I'll see

1 you at the hearing date.

2 MR. BLOCK: Okay.

3 MR. COLE: Thank you. Your Honor.

4 MS. POLIVY: Thank you.

5 (Whereupon, at 10:00 a.m. on Thursday, May 16,
6 1996, the hearing adjourned.)

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